

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA	:	
	:	
v.	:	CR No. 16-21JJM
	:	
NEFTALI MELENDEZ	:	

REPORT AND RECOMMENDATION

PATRICIA A. SULLIVAN, United States Magistrate Judge.

This matter has been referred to me pursuant to 28 U.S.C. § 636(b)(1)(B) and 18 U.S.C. § 3401(i) for proposed findings of fact concerning whether Defendant Neftali Melendez is in violation of the terms of his supervised release and, if so, for recommended disposition. In compliance with that directive and in accordance with 18 U.S.C. § 3583(e) and Fed. R. Crim. P. 32.1, a hearing was conducted on September 9, 2019, at which time Defendant waived a violation hearing and admitted that he had committed the charged violations. I released Defendant with the additional bail condition of a curfew with radio frequency monitoring while this matter is pending. Based on Defendant's admissions, the parties' joint recommendation and the following analysis, I do not recommend that the Court revoke supervision; rather, I recommend that Defendant continue on his current term of supervised release with a modification based on the bail condition as follows:

Defendant shall submit to radio frequency monitoring for a period of sixty days and comply with all of the program requirements and instructions provided. Defendant shall pay all or part of the cost of the program based upon ability to pay as determined by the U.S. Probation Office.

Defendant shall be restricted to his residence every day from 9:00 p.m. to 6:00 a.m. for a period of sixty days.

Defendant shall participate in a program of mental health treatment as directed and approved by the Probation Office.

Defendant shall participate in substance abuse testing (up to 72 tests per year), as directed by the U.S. Probation Officer. The frequency of the testing may be increased at the discretion of the U.S. Probation Officer.

Defendant shall participate in substance abuse treatment, as directed by the U.S. Probation Officer.

Defendant shall participate in a manualized behavioral program as directed by the United States Probation Office. Such program may include group sessions led by a counselor or participation in a program administered by the United States Probation Office.

Defendant shall contribute to the cost of treatment based upon ability to pay, as determined by the U.S. Probation Office.

I. BACKGROUND

On August 26, 2019, the Court granted the Probation Office's petition for the issuance of a summons charging Defendant with the following violations:

Violation No. 1: You must refrain from any unlawful use of a controlled substance.

Mr. Melendez used cocaine as evidenced by positive drug tests on July 8, 17 and 22, 2019.

Violation No. 2: The defendant shall reside at a Residential Re-entry Center, preferably the Houston House in Pawtucket, Rhode Island, for a period of six months. While at said facility, the defendant shall comply with all the policies, procedures, and regulations therein.

Mr. Melendez was unsuccessfully terminated from the Houston House on August 8, 2019, due to his alcohol and drug use in the program, which is against their regulations.

Defendant appeared before the Court on September 9, 2019, waived his right to a revocation hearing and admitted to the two violations. Based on his admissions, I found him guilty of violating the terms and conditions of his supervised release.

II. APPLICABLE LAW

Title 18 U.S.C. § 3583(e)(3) provides that the Court may revoke a term of supervised release and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on post-release supervision, if the Court finds by a preponderance of evidence that the defendant has violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be sentenced to a term beyond five years if the instant offense was a Class A felony, three years for a Class B felony, two years for a Class C or D felony, or one year for a Class E felony or a misdemeanor. In this case, Defendant was on supervision for a Class C felony; therefore, he may not be required to serve more than two years imprisonment upon revocation.

Title 18 U.S.C. § 3583(e)(2) provides that if the Court finds that the defendant violated a condition of supervised release, the Court may extend the term of supervised release if less than the maximum term was previously imposed. In this case, the maximum term of supervised release is life.

Title 18 U.S.C. § 3583(h) and § 7B1.3(g)(2) of the United States Sentencing Guidelines (“USSG”) provide that when a term of supervised release is revoked and the defendant is required to serve a term of imprisonment that is less than the maximum term of imprisonment authorized, the Court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release. In this case, the authorized statutory maximum term of supervised release is life.

Section 7B1.1 of the USSG provides for three grades of violations (A, B and C). Subsection (b) states that where there is more than one violation, or the violation includes more than one offense, the grade of violation is determined by the violation having the most serious grade.

Section 7B1.1(a) of the USSG provides that a Grade A violation constitutes conduct that is punishable by a term of imprisonment exceeding one year, and that (i) is a crime of violence, (ii) is a controlled substance offense, or (iii) involves possession of a firearm or destructive device, or any other offense punishable by a term of imprisonment exceeding twenty years. Grade B violations are conduct constituting any other offense punishable by a term of imprisonment exceeding one year. Grade C violations are conduct constituting an offense punishable by a term of imprisonment of one year or less; or a violation of any other condition of supervision. Section 7B1.3(a)(1) states that upon a finding of a Grade A or B violation, the Court shall revoke supervision. Subsection (a)(2) states that upon a finding of a Grade C violation, the Court may revoke, extend or modify the conditions of supervision. In this case, Defendant has committed a Grade C violation; therefore, the Court may revoke, extend or modify the conditions of supervision.

Should the Court find that the defendant has committed a Grade B or C violation, § 7B1.3(c)(1) states that where the minimum term of imprisonment determined under § 7B1.4 is at least one month, but not more than six months, the minimum term may be satisfied by (a) a sentence of imprisonment; or (b) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in § 5C1.1(e) for any portion of the minimum term. Should the Court find that the defendant has committed a Grade B or C violation, § 7B1.3(c)(2) states that where the minimum

term of imprisonment determined under § 7B1.4 is more than six months but not more than ten months, the minimum term may be satisfied by (a) a sentence of imprisonment; or (b) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in § 5C1.1(e), provided that at least one half of the minimum term is satisfied by imprisonment. The second provision, which allows for alternatives for one-half of the minimum term, applies to this matter.

Pursuant to § 7B1.3(d), any restitution, fine, community confinement, home detention, or intermittent confinement previously imposed in connection with the sentence for which revocation is ordered that remains unpaid or unserved at the time of revocation shall be ordered to be paid or served in addition to the sanction determined under § 7B1.4 (Term of Imprisonment), and any such unserved period of confinement or detention may be converted to an equivalent period of imprisonment. In this case, there is \$200 outstanding on the special assessment and just over three months of outstanding community confinement.

Section 7B1.4(a) of the USSG provides that the Criminal History Category is the category applicable at the time the defendant was originally sentenced. In this instance, Defendant had a Criminal History Category of VI at the time of sentencing.

Should the Court revoke supervised release, the Revocation Table provided for in § 7B1.4(a) provides the applicable imprisonment range. In this case, Defendant committed a Grade C violation and has a Criminal History Category of VI. Therefore, the applicable range of imprisonment for this violation is eight to fourteen months.

Section 7B1.5(b) of the USSG provides that, upon revocation of supervised release, no credit shall be given toward any term of imprisonment ordered, for time previously served on post-release supervision.

III. ANALYSIS

On January 20, 2017, Defendant pled guilty to two counts of distribution of cocaine base and was sentenced to twenty-four months of incarceration, with a three-year term of supervised release to follow. Supervision commenced on November 15, 2017; two days later Defendant entered a ninety-day residential treatment program at the Phoenix House as required by one of the special conditions. After little more than a month, Defendant was violated for absconding and for drug and alcohol use; he was sentenced somewhat harshly to a year and a day in light of uncharged (by Probation) criminal conduct (failing to stop for accident resulting in damage and domestic violence) committed while he was AWOL. Supervised release recommenced on May 16, 2019, with an expiration date of May 15, 2020.

In accordance with his new condition of six months at a residential reentry center, Defendant immediately entered the Houston House upon his release. However, less than two months later, Defendant tested positive for alcohol, on June 27, 2019; less than two weeks after that, he began to test positive for cocaine, on July 8, 16 and 22, 2019. When he tested positive for alcohol again on August 7, 2019, Houston House terminated him from the program. To address his continuing substance use, Defendant began treatment at CODAC on August 19, 2019. The three positive cocaine tests and the termination by Houston House for drug and alcohol use are the bases for the two charged Violations.

With Defendant nearing the end of supervision on May 15, 2020, the government and Defendant jointly propose that Defendant be allowed to continue on the current term with a modification to his conditions. Instead of being required to complete the term at the Houston House, they ask the Court to eliminate this condition and substitute sixty days of radio frequency monitoring with a curfew from 9:00 p.m. to 6:00 a.m., along with increased drug testing at

Probation's discretion.¹ This plan would allow Defendant to continue the positive things that he has been pursuing, including working hard at his brother's barbershop, attending treatment sessions at CODAC and remaining with his family, which was an issue for him while at the Houston House. The goal of the joint proposal is to allow Defendant to use productively, and to benefit from, the time he has left on supervised release.

On allocution, Defendant stated that he is guilty, but he was going through some things. He pointed out that he was doing well before and was having clean drug tests, but that he let things get to him, although he does not want to make excuses. He said he will accept whatever consequences come to him. Defendant expressed his appreciation of all that Probation has done for him, including helping him to overcome his fear of speaking around people so that now he is able to work from 8:00 a.m. to 7:30 p.m. He said that he hopes Probation can assist him with getting his license back during the remaining time he will be on supervision.

Mindful of the 18 U.S.C. § 3553(a) factors that guide the Court's sentencing decision, I concur in the parties' joint proposal. I recommend that, instead of revoking supervision, the Court continue Defendant on his current term of supervised release, but modify his conditions as discussed in this report and recommendation.

IV. CONCLUSION

After considering the appropriate factors set forth in 18 U.S.C. § 3553(a) and for the reasons expressed above, I recommend that the Court continue Defendant on his current term of supervised release and impose modified conditions as follows:

Defendant shall submit to radio frequency monitoring for a period of sixty days and comply with all of the program requirements and instructions provided.

¹ The intent is that this condition will replicate the time remaining (approximately three months) on the Houston House condition. Because it was imposed as a bail condition on September 9, 2019, it is anticipated that the imposition of sixty days at sentencing will result in a total of approximately three months.

Defendant shall pay all or part of the cost of the program based upon ability to pay as determined by the U.S. Probation Office.

Defendant shall be restricted to his residence every day from 9:00 p.m. to 6:00 a.m. for a period of sixty days.

Defendant shall participate in a program of mental health treatment as directed and approved by the Probation Office.

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Defendant shall participate in substance abuse treatment, as directed by the U.S. Probation Officer.

Defendant shall participate in a manualized behavioral program as directed by the United States Probation Office. Such program may include group sessions led by a counselor or participation in a program administered by the United States Probation Office.

Defendant shall contribute to the cost of treatment based upon ability to pay, as determined by the U.S. Probation Office.

Any objection to this report and recommendation must be specific and must be served and filed with the Clerk of the Court within fourteen (14) days after its service on the objecting party. See Fed. R. Crim. P. 59(b); DRI LR Cr 57.2(d). Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district judge and the right to appeal the Court's decision. See United States v. Lugo Guerrero, 524 F.3d 5, 14 (1st Cir. 2008); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Patricia A. Sullivan

PATRICIA A. SULLIVAN
United States Magistrate Judge
September 16, 2019